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Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 565.

CHARLES D. NEWTON, as Attorney-General of the State of New York; and EDWARD SWANN, as District Attorney of New York County, *et al.*,

Appellants,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK,

Appellee.

Brief on Behalf of the Appellants.

This is an appeal by the above named appellants from part of a decree made in this cause and entered in the office of the Clerk of the United States District Court, Southern District of New York, on the 30th day of April, 1923, which reads as follows:

> "4. The exceptions of the defendants to the allowance of $76,086 for premiums on bonds filed with Special Master Richard Welling in lieu of the deposit of impounded funds with him are hereby overruled" (Rec., p. 21).

and also from a judgment for the sum of $129,693.97 which was entered thereafter on the 27th day of July, 1923 (Rec., pp. 22-39).

The appeal arises out of a suit commenced in the United States District Court for the Southern District of New York to set aside as unconstitutional Chapter 125 of the Laws of 1906, which fixed the price at which gas was to be furnished to private consumers in the various boroughs in the City of New York.

The decree herein appealed from is supplemental to the decrees passed upon by this Court in Newton *vs.* Consolidated Gas Co. (258 U. S. 165, and in 259 U. S. 101), and was made pursuant to paragraph 16 of the decree there involved. That paragraph is as follows:

> "(16) Further ordered, adjudged and decreed that the plaintiff to recover its costs and disbursements when duly taxed of the defendants to be borne equally upon them, and that the allowance and expenses of Abraham S. Gilbert, Esq., the special master appointed to hear and report herein, shall be fixed by the Court upon motion made by any party hereto, or by the said special master, and shall be paid by the defendants equally, or upon their default, then out of the cash, bonds, or surety bonds hereinbefore described" (Rec., p. 32).

On March 6, 1922, this Court, affirming the decree of the lower court (258 U. S. 165), decided that the above statute was confiscatory.

A notice of taxation was thereafter served to have the Clerk tax the costs and disbursements

at a total amount of $192,607.28 (Rec., p. 1). This amount was reduced by $28,750, by reason of the reduction by this court, of the fees paid to the Special Master (259 U. S. 101); and also by the disallowance and reduction of several items.

The defendants moved to re-tax the costs before Hon. Learned Hand (Rec., p. 18), whose decree was entered on April 30, 1923, overruling the exceptions of the defendants as to the item of $76,086.00 and directing the Clerk to enter judgment which was done on July 27, 1923, in the sum of $129,693.97.

This appeal brings up the question as to the liability of the appellants for the premiums on Surety bonds, which were filed by the appellee, instead of cash, to cover the difference between the price of 80 cents allowed by Chapter 125 of Laws of 1906 and the amounts collected, pending the final determination by this Court.

This suit was brought to set aside the statute and the extraordinary relief of an injunction to prevent the public officers of the State from moving against the complainant was asked for in the prayer for relief.

The District Court in its opinion of February 28, 1921, said:

> "* * * It may be observed that if the plaintiff had chosen to await the action of the defendants it would have been free to charge and keep whatever it wished, the statutory rate having in fact become invalid. It was, however, not content with that course, but demanded the extraordinary relief of an injunction to prevent the defendants moving against it at all. In so doing it subjected it-

> self to all equitable conditions upon that relief, from which it could and can still at any moment be free by vacating the decree" (274 Fed. 986, 7).

The remedy pursued by the appellee in freeing itself from the statute and the relief demanded were solely within the discretion of the appellee; appellants had no part therein.

That Court imposed certain conditions upon granting the injunction, viz: the impounding of whatever moneys were collected from the consumers in excess of the statutory rate pending determination of the appeal to this Court.

The original decree of August 4, 1920 provided, among other things, as follows:

> "* * * The plaintiff shall, on the 15th day of August, 1920, and on the 15th day of each succeeding month, pay to Richard Welling, Esq., (who is hereby appointed Special Master for that purpose), out of all moneys collected by it for sale of gas in the City of New York, the following sums: All sums in excess of eighty cents collected from all consumers other than the City of New York: * * *" (Record, pp. 13, 14).

The appellee thereupon complained to the District Court of the conditions imposed upon it of impounding the cash with the Special Master, and asked to substitute other security and be allowed to withdraw the cash for its own use.

That motion was based upon the claim that the impounding of the cash would cause a loss to the gas company, that the substitution of other se-

curities would greatly benefit it on the one hand, and would not jeopardize the interests of the defendants on the other. That Court said in its opinion of August 11, 1920:

> "*Provision for Deposit of Moneys Impounded.*
>
> The plaintiff urges with force, I think, that to impound all the money over eighty cents for a period of perhaps of a year, will cause loss both to itself and to the consumers. It suggests that it have the right to substitute adequate securities. The best that the special master can get on the deposits is probably three and a quarter per cent; the plaintiff if required to finance its temporary requirements must pay much more, it says fourteen per cent. In any case it will sustain a loss which will profit no one but the banks, so far as appears. I see no advantage in insisting upon impounding the moneys if adequate security can be otherwise provided. I shall therefore modify the decree by allowing the plaintiff to deposit with the master in lieu of cash Liberty Bonds taken at their market value, or any other bonds which are a proper investment by savings banks in New York" (267 Fed. 272), (Rec., p. 25).

The Court also permitted it to file surety bonds under the following conditions:

> "Also I allow the plaintiff to substitute surety company bonds for cash to withdraw cash by giving such bonds, on the following

> conditions: No single company shall give a larger bond than $500,000 or more than one bond. The bond must secure not only the cash for which it is substituted but interest at seven per cent, during the period of its existence, which is to be part of the funds" (267 Fed. 272), (Rec., p. 26).

Appellants contended that the substitution of other securities was solely for the benefit and advantage of the appellee. The appellants asked that the cash be impounded with the Special Master and opposed the motion to substitute other security therefor, but the Court granted the relief asked for.

The courts do not seem to have passed upon the question whether amounts paid for surety bonds given for a similar purpose as herein, are a taxable item as a disbursement. At least we are unable to find any authority to sustain such a proposition.

The cases bearing upon the question whether premiums upon surety bonds are taxable, relate to appeal bonds and supersedeas bonds, or bonds given in admiralty cases to release a libeled vessel. None of these cases are analogous to the instant case. In the admiralty case, an unsuccessful attack and an unlawful retention of the vessel takes place, putting the defendant to considerable expense to gain the use of his vessel held as security for damages expected to be obtained in the action.

In the instant case there was no attack made upon the Consolidated Gas Company by the public officers putting it to any expense to release its

property unlawfully retained as security for damages.

A similar question arises in the following cases affecting other gas companies operating within the City of New York.

1. East River Gas Company of Long Island City.
2. The New York Mutual Gas Light Company.
3. Northern Union Gas Company.
4. Central Union Gas Company.
5. The Standard Gas Light Company of The City of New York.
6. New Amsterdam Gas Company.
7. Brooklyn Union Gas Company.
8. Flatbush Gas Company.

Appeals have been taken in the first six, whereas final judgments have not been entered in the last 2 cases.

The total amount involved in all of the cases is $141,131.00.

We contend, first: that the disbursement for premiums on surety bonds in the instant case was a needless and unnecessary expenditure, so far as the appellants were concerned. Second, The substitution of other surety for the cash impounded enured to the benefit of the appellee solely, and the appellants should not be taxed for a disbursement made solely for the benefit and advantage of the appellee.

POINT I.

This is a final order within the holdings of the decisions.

In Odell *vs.* Batterman, 223 Fed. Rep., 292, it was held:

> "Under the decisions an adjudication is a final appealable order if it involves the determination of a substantial right against a party in such a manner as leaves him no adequate relief except by recourse to appeal."

In Central Trust Company *vs.* United States Light and Heating Co., 233 Fed. Rep., 420, it was held that an order fixing counsel fees was final and appealable.

The Court said:

> "The order was final and conclusively adjudicated something over which the Court had jurisdiction and which arose in the progress of the litigation although distinct from the general subject of the suit."

In the very recent case of

> Georgia Railway & P. Co. *v.* Town of Decatur, 262 U. S., 432, 441,

Mr. Justice Sutherland, speaking for the Court, said:

> "While prior decisions on the subject of what constitutes a final judgment are not entirely harmonious, the rule is established that,

in order to give this court appellate jurisdiction, the judgment or decree 'must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered'— Bostwick *v.* Brinkerhoff, 106 U. S., 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15, and cases cited."

POINT II.

This Court has jurisdiction of the entire case and of all questions involved in it.

This appeal was taken directly to this Court from the decree of the District Court, Southern District of New York, because of the provisions of Section 238 of the Judicial Code, which provides in part as follows:

> "Appeals and writs of error may be taken from the District Court * * * direct to the Supreme Court in the following cases * * * and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

and

Section 128 of the Judicial Code which provides:

> "The Circuit Court of Appeals shall exercise jurisdiction to review by appeal or writ of error, final decisions in the District Court * * * in all cases other than those in which

> appeals and writs of error may be taken direct to the Supreme Court * * *."

This Court has held in a number of cases that where a constitutional question is involved, it will take the case to itself and decide all of the questions involved.

In Brolan *vs.* U. S., 236 U. S. 216, the Court said:

> "Our jurisdiction to directly review depends upon the constitutional question, since the other matters relied upon are as a general rule within the exclusive jurisdiction of the Circuit Court of Appeals * * * although if power to review attaches to the case because of the constitutional question, that authority gives rise to the duty to determine all the questions involved" (Burton *vs.* U. S., 196 U. S. 283; Williamson *vs.* U. S., 207 U. S. 425, at p. 432; Billings *vs.* U. S., 232 U. S. 261, at p. 276).

In the Williamson case, *supra,* the Court said:

> "If there be a constitutional question adequate to the exercise of jurisdiction the duty exists to review the whole case."

In Burton *vs.* United States, 196 U. S. 286, at 295, where a constitutional question was raised which, although not decided in favor of appellant, the Court said was not frivolous, it was held:

> "* * * the statute grants to this Court jurisdiction to issue the writ of error directly to the District Court, and then to decide the

case without being restricted to the constitutional question."

In Farmers Loan and Trust Company, 129 U. S., 206, the Circuit Court of Appeals made an order after the final judgment in the case and after an appeal had been taken to the Supreme Court and by a unanimous decision of this Court, it was held that this order was appealable. In that case Mr. Justice Bradley said:

> "In the present case the order complained of being final in the matter to which it relates, and being made since the final decree in the cause, and not reviewable on the appeal from that decree, it may be as well reviewed here as in any other way."

In Citizens Bank *v.* Cannon, 164 U. S. 319, at page 323, the Court said:

> "* * * As a general rule, an appeal will not lie in a matter of costs alone. But such appeals have been sustained in particular circumstances, as, for instance, where the costs have been directed to be paid out of a trust fund. In Trustees *v.* Greenough, 105 U. S. 527, this court said, through Mr. Justice Bradley, that the objection to an appeal on the ground of its being from a decree for costs only is untenable. * * * "

In, Ex Parte Hughes 114 U. S. 548 this court passed upon a question with reference to the taxation of Costs.

It seems to be settled that where an appeal or writ or error is taken direct to this Court under

subdivision 5 of said section 238 of the Judicial Code, this Court acquires jurisdiction, not only of the question specified in that section, but of all the questions involved in the entire case.

> Horner *vs.* United States, 143 U. S., 570 pp. 576-577.

In one of the appeals in connection with the litigation in question;

> City of New York *v.* Consolidated Gas Company, 253 U. S. 217,

Mr. Justice Day, speaking for the Court, at page 221, said:

> "* * * As the jurisdiction of the District Court was based upon constitutional grounds only, the case was not appealable to the Circuit Court of Appeals. * * *"

This Court has also taken jurisdiction in an appeal regarding the compensation of a Special Master in the instant case and which item as reduced by this Court is now in the Bill of Costs as taxed (Rec. p. 7; 259 U. S. 101).

POINT III.

The court had the right, in granting the injunction, to direct the impounding of the difference between the statutory rate and that allowed under the injunction.

In the original suit to have the 80 cent statute set aside, (Willcox *v.* Consolidated Gas Co. 146 Fed. 150, 156; 157 Fed. 849; 212 U. S. 19) an injunction was granted by the Circuit Court; Judge Lacombe said at page 156:

> "* * * This is an argument which has always appealed most strongly to Courts of Equity and there are abundant authorities to support the proposition that, pending the decision of a doubtful question, the *status quo,* proper security being exacted, should be preserved."

In granting the injunction upon terms, the court must have had in mind the fact that a similar injunction had been granted by the Circuit Court in the original suit to test this statute and the further fact that this Court had reversed the lower court and refused to hold the statute to be confiscatory.

The court's attention was also called to the fact that a large amount of money collected under that injunction had never been returned to the consumers and that $472,891.15 was still in the possession of the Company.

The District Court said (Rec., p. 27):

> "The plaintiff is not, however, absolutely entitled to an injunction, it is an equitable remedy and may be refused except on equitable conditions (Waldon *v.* Bolley, 14 Pet. 156, 164); the rule is of course most ancient and of the widest application. It has in effect been imposed in very similar circumstances (State R. R. Tax cases, 92 U. S. 575; Cummings *v.* Natl. Bank, 101 U. S. 163; People's National Bank *v.* Marye, 191 U. S. 272, 282-288). Norwood *v.* Baker, 177 U. S. 269, 291-294, special assessment case, is perhaps to the contrary in effect, but only because the authorities were free to make the proper assessment."

This Court, in affirming the decree in the present case, said:

> "It was within the court's discretion to grant the injunction upon terms and we cannot now say that the limitation upon charges amounted to abuse * * * Undoubtedly, after appeal the trial court may, if the purposes of justice require, preserve the *status quo* until decision by the appellate court. Hovey *v.* McDonald, 109 U. S. 150, 157." * * * (Newton *v.* Consolidated Gas Co., 258 U. S. 165, 177).

In,

Ex Parte Lincoln Gas Co. 256 U. S. 512,

this Court had before it a question which related to moneys collected in excess of a rate fixed by an ordinance, which was held to be valid.

The Gas Company in that case tried by every possible means to avoid the repayment to Con-

sumers of the sums which had been collected under the terms of the injunction.

The Company attempted by Mandamus, to prevent the District Court from assuming jurisdiction to effect the return of the excess collections.

Mr. Justice Pitney speaking for the Court said at p. 517, 518:

> "* * * The ordinance was intended to limit the gas rate for the benefit of the consumers; suit was brought against the municipality and its officers as the public representatives of the interests of the consumers; the restraining order and temporary injunction were intended for the very purpose of enabling the company to exact, pending the suit, rates in excess of those limited by the ordinance; the equitable duty to refund excess charges if the suit should fail was a duty owing to the consumers; and the form of the supersedeas bond recognized all this, and was particularly designed for their protection."

POINT IV.

There is no rule of this court authorizing or permitting such an item to be taxed as costs.

The question of taxable costs is covered by Sections 823 and 983 of the Revised Statutes.

Section 823 provides:

> "The following and no other compensation shall be taxed and allowed * * * except

in cases otherwise expressly provided by law."

Section 983 provides:

> "The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases whereby law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause."

The above sections should not be interpreted to give the right to tax the cost of obtaining surety bonds in a case such as the one in question.

We find no rule of this court which authorizes or permits the taxation of an item claimed to have been paid for premium on surety bonds, substituted as security in the place of the cash directed to be impounded by the court.

The District Court in its opinion says as follows (291 Fed. 704, 705, 706, at pages 705-6:

> "Before the amended admiralty rules fixed the practice, it had been the custom in this Circuit to allow as costs premiums on stipulations given to release vessels from arrest. *The Volund,* 181 Fed. 643 (C. C. A. 2), *The Hurstdale,* 171 Fed. 607, *The John D. Dailey,* 158 Fed. 642. Elsewhere the authorities were not unanimous, but in such matters we follow

> our local custom. I have been unable to get much help out of the books as to the rule in suits in equity. Judge Lacombe in Edison *v.* American Mut. Co., 117 Fed. 192, allowed premiums paid on a supersedeas bond, in what I take to have been a suit in equity, but that is the only case in this Circuit which I can find. It has, however, been our uniform custom to allow such items in all sides of this court for the fourteen years that I have sat here, and no distinction has ever been drawn between law, equity or admiralty. I think that the decisions on the admiralty side before the rule are competent authority if anything more than custom be necessary. Therefore I shall let the taxation stand as respects the premiums paid on surety bonds" (Rec., p. 34).

As stated by the Court, only one of these cases is an Equity Case and the decision is by a Circuit Judge.

An examination of the other cases cited by the lower court,

> The Volund, 181 Fed. 643,
> The Hurstdale, 171 Fed. 607,
> The John D. Dailey, 158 Fed. 642,

discloses that the reason for allowing premiums on surety bonds was that they were given in accordance with Rule XXI of the Admiralty Rules (for the Southern District of New York), which reads as follows:

> "Property seized by the Marshal may be released as follows:

'FIRST: By giving bond as provided in Section 941 of the Revised Statutes.

'SECOND: In suits for sums certain, by paying into Court the amount alleged in the libel as due, with interest as claimed therein up to the stated term next succeeding the return day, or by filing an approved *stipulation* for such alleged amount, with interest, and by payment into Court of the costs of officers of the Court already accrued, and by depositing also the sum of $250, to cover further costs; or in lieu of such deposit giving a stipulation for costs in the usual form.' " (Italics ours.)

Rule VII of the Admiralty Rules of this Court expressly allows premiums on Bonds to be taxed as costs.

The question is one that does not come up very often, hence the paucity of decisions; but in a case decided by the Circuit Court of Appeals for the 6th Circuit.

Lee Injector Mfg. Co. *vs.* Penberthy Injector Co., 109 Fed. 964.

It was held in an opinion by Judge Lurton (later a member of this Court):

" • • • The appellant has now filed a petition praying a retaxation of costs as follows:

3. That the sum of $10.50 paid a surety company for furnishing appeal bonds, be taxed as costs. This must be disallowed, as there is no authority for taxing such an item."

In another case, *In re* Michigan Cent. R. Co., 124 Fed. 727 (decided by the Circuit Court of Appeals for the Sixth Circuit), Judge Lurton again speaking for the Court at pages 732 and 733, said:

> "* * * In equity and in admiralty the taxation of costs, as between the parties, is a matter of sound legal discretion, and for this reason it is said that generally an appeal will not lie alone from a decree taxing costs (citing cases). But if the appeal be also upon the merits, the court, having the whole decree before it, may also consider the action of the court in this respect, upon a proper assignment of errors."
>
> * * * * * * *
>
> "* * * It would be most extraordinary if such a question was not subject to review, for it would place the construction of the statute settling costs and fees entirely within the arbitrary control of each court to whom the question was presented."
>
> * * * * * * *
>
> "The power of the chancellor to fix an allowance out of a fund in court for the services of a special master, receiver, counsel, trustee, etc., is not uncontrollable, as it would be if orders making such allowances were not subject to review. In such matters great latitude may be properly accorded to the judge administering a property, and acquainted with the services and qualifications of persons rendering special services under the court's direction. Nevertheless, if wrong principles be applied in settling such compensation, or an allowance grossly excessive be

made, it would be competent for an appellate court to correct the wrong. The most extravagant allowances in such cases, and the grossest misapplication of correct legal principles, might go unchallenged unless the matter was subject to review by appeal. Trustees *v.* Greenough, 105 U. S. 527, 528, 26 L. Ed. 1157; Williams *v.* Morgan, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559; Mason *v.* Pewabic Mining Co., 153 U. S. 361, 14 Sup. Ct. 847, 38 L. Ed. 745. * * *"

In *The Gov. Ames* (187 Fed. 48), decided by the Circuit Court of Appeals for the 6th Circuit, Judge Putnam, speaking for the court, said at page 49:

"In *Ex parte* Hughes, 114 U. S. 548, Sup. Ct. 1008, 29 L. Ed. 281, an allowance claimed for the printing of briefs was denied, but the printing of what was, in the nature of pleadings, a part of the record, was allowed. Both rested on the fact of usage, which the court saw no justification in disturbing; but no usage is available here.

Many citations have been made, but none of them are authoritative with us except Lee Co. *v.* Penberthy Co., 109 Fed. 964, 48 C. C. A. 760, decided by the Circuit Court of Appeals, for the Sixth Circuit, on June 15, 1901. There the amount paid a surety company for furnishing an appeal bond was stricken out of the taxation. It is true that the Circuit Court of Appeals for the Ninth Circuit, in Jacobsen *v.* Expedition Co., 112 Fed. 73, 80, 50 C. C. A. 121, decided October 7, 1901, allowed the cost of giving security in damages

by a respondent who filed a cross-libel. In that case the security was required by Admiralty Rule of the Supreme Court 53, so that there was there behind the expenditure at least the requirement of the rule. The opinion, however, cited a number of cases, none of which fairly support the allowance. Likewise, the allowance of the premium on a bond for costs in *The Volund* (by the Circuit Court of Appeals for the Second Circuit), 181 Fed. 643, 667, was apparently based in the same manner on the fact that the bond was required by the rules of the court of the first instance. As therefore in this case, there is neither usage nor any court order, the objection of the Lejok to the allowance of this item of costs is sustained; and this without determining what would be the effect of an order if there had been one."

In *The Texas* (226 Fed. 897), decided by the Circuit Court of Appeals, Third Circuit, Judge McPherson, speaking for the Court, said at page 905:

"2. The next question is whether the District Court was correct in refusing to tax as part of the costs the premiums that were paid for the entry of corporate security. The precise point is not whether, in our opinion, modern conditions have made it desirable that such premiums should be taxed as costs, but whether any statute, or any rule or equivalent custom in the district of Delaware, required or justified the taxation. The clerk rejected the items on the following ground:

"I do not know of any statute that makes such items taxable as disbursements or otherwise, and there is no rule of court or established practice in this district permitting a recovery of such items. I am aware of no decision of the Circuit Court of Appeals for the Third Circuit or of the District Court for this District on this subject."

And the District Court affirmed the clerk's decision.

In our opinion the clerk was right in saying that no statute makes such an item taxable. The subject has been sufficiently discussed in the following cases: (Citing cases.) And we shall only add our approval of the argument that a rule of court, or a practice equivalent thereto, is needed to justify the taxation."

In Parkerson *v.* Borst (256 Fed. 827), a recent case, decided by the Circuit Court of Appeals for the 5th Circuit.

Judge Grubb, speaking for the Court, quoted the above case with approval and also said at page 829 as follows:

"The case of Edison *v.* American Mutoscope Co., 117 Fed. 192, a Circuit Court case, apparently supports the contrary rule. The Circuit Judge, however, bases his opinion upon the fact that the disbursement was one rendered necessary by a rule of practice, and the rule of practice is not set out in the opinion. In this case, the disbursement was not made as a result of any rule of practice, and there is no statute, rule or order or

usage, by which it is made a part of the taxable costs of the case. The District Judge properly disallowed the item. The judgment is affirmed and the plaintiff in error taxed with the costs of appeal."

POINT V.

The substitution of surety bonds in place of cash was solely for the benefit of appellee, and for that reason the item should not have been allowed.

The appellee not being satisfied with the conditions imposed by the original order of August 4, 1920, requiring the excess collections in cash to be deposited with the Special Master; moved to modify it so that bonds might be substituted in place of the cash. As was stated in the opinion of the court, appellee urged that in order to finance its temporary requirements it would have to probably pay 14 per cent. (Rec., p. 25). The idea of permitting the appellee to take down the money was for the purpose of saving this large percentage which it claimed it would have had to pay. The report of the Special Master shows that no cash was deposited with him. If, by taking down the moneys, appellee saved approximately 10 per cent, the amount it gained by the substitution of the bonds was ample recompense to it without imposing the cost of same upon the appellants.

POINT VI.

The appellants have already had substantial costs imposed upon them by reason of the order that permitted appellee to take down the impounded moneys.

The sum of $15,000 paid to Richard Welling, special master appointed for the purpose of having the custody of the impounded moneys, has been taxed against the appellants and also his expenses amounting to $2330.06 were allowed by the court (Rec., p. 8).

So that by allowing the appellee to substitute Surety Bonds in place of the cash, the appellants are required to pay $78,416.06; while, on the other hand, the appellee had the benefit of the use of money which it claims would have cost approximately 14 per cent, if it had been borrowed from outside sources.

In the prior suit (212 U. S. 19), the moneys were impounded during the litigation of the pending appeal, although it afterwards turned out that the statute was not confiscatory and that the impounded moneys belonged during the entire litigation to the consumers. Nevertheless, the company still has on hand, according to its report, to the Public Service Commission for the year 1922, the sum of $472,891.15 belonging to the consumers which was impounded during the pendency of that suit. The interest on this vast amount of money belonging to the consumers, which has never been paid over by the Consoli-

dated Gas Company, is more than sufficient in itself to pay the amount paid for the premiums on Surety Bonds, and the consumers ought at least to have the benefit of this fund at this time to the extent above indicated.

POINT VII.

Had appellee co-operated with the appellants in advancing the appeal there would have been no necessity for expending part of the sums for premiums on Surety Bonds.

Foster in his work on Federal Practice, Vol. 2, 6th Edition, says at page 1998:

> "§409. Costs in Equity. Courts of Chancery in general follow the rule of the Civil Law, *victus victori in expensis condemnatus est,* and decree the payment of costs by the unsuccessful to the successful parties to a suit before it. It often happens, however, that they depart so far from this rule as to deny costs to the successful party, and, in certain classes of cases, they will even compel him to pay costs to those against whom he obtains decree."

By the decree of the District Court the appellants were required to take their appeal within 30 days instead of the three months allowed by the statutes, and also were required to perfect it at an early date and move to advance the argument of the appeal (Rec., p. 33).

The appellants made every effort to expedite the perfecting of the appeal and the certification of the record. (Case No. 807 October Term 1920; No. 257 October Term 1921.) After the record was ready the appellants made a motion in this Court in March 1921, to have the case heard that Spring. This motion was vigorously opposed by appellee which resulted in the court setting the case down for argument in October 1921, although another case where no opposition had been made to the advancement of the appeal, was advanced by this Court for April 11, 1921. Before the date set for the argument in October, appellee made a motion to continue the argument for a later date, which was granted, against our protest, and it was finally set down for November 14, 1921. A great deal of the delay in the argument of the appeal and the determination of the appeal is attributable to the appellee; consequently, the result of all this was to cause more money to be impounded and to make it necessary for the company to deposit additional Surety bonds with the Special Master, which extra costs they now seek to have appellants pay.

POINT VIII.

Abuse of discretionary power is reviewable by this Court.

It is fundamental that discretion will not be ordinarily reviewed; but where under the circumstances it appears to have been exceeded or abused the general principle will not apply. In

Newton vs. *Consolidated Gas Company of New York,* 259 U. S. 101, it was held that the discretionary power of a Federal Court under Equity Rule 68, to fix the compensation of a master, does not extend to arbitrary and unreasonable action; in that case it was claimed discretion was abused in that the allowance made for the master's fees was excessive. Mr. Justice McReynolds, speaking for the Court, said, at page 105:

> "Discretion within intendment of the rule is a judicial one; it does not extend to arbitrary and unreasonable action and our review is limited to the question of its improvident exercise * * *."
>
> * * * * * *
>
> "Ordinarily we may not substitute our judgment for its deliberate conclusions nor interfere with the exercise of its discretion. But when that Court falls into error which amounts to abuse of discretion and the cause comes here by proper proceedings appropriate relief must be granted."

If this Court has the power to review an order based upon abuse of discretion as was held in the above case, there must necessarily be the right to bring the question up for review.

Foster in his work on Federal Practice, Vol. 2, 6th Edition, says at page 1992:

> "When, however, it is said as it often is, that the award of costs in equity is purely discretionary, it should not be supposed that Courts of Equity are governed by no fixed principles in their decisions relative to the

> costs of proceedings before them. All that is meant by the expression is that, in awarding costs, they will take into consideration the circumstances of the cases before them and the situation or conduct of the parties, and exercise with reference to these points a discretion governed by certain reasonable definite rules, the enforcement of which is not dependent upon the caprice of the Judge by whom each cause happens to be heard, but is often a ground of review by an Appellate Tribunal."

In the case of McIntosh *v.* Ward, decided by the Circuit Court of Appeals, for the 7th Circuit (159 Fed. 66), Judge Baker, speaking for the Court, said at pages 68, 69:

> "Appellees insist that nothing is involved but a matter of costs, and therefore that the appeal will not lie. The assertion quite evidently begs the question. The record presents the reviewable inquiry whether certain items that are embodied in the final judgment against Appellant are or are not taxable costs as between the parties.
>
> By the ancient common law items of expense in the conduct of litigation, paid or incurred by one party, were not allowable in the judgment against the other. Such allowances were of statutory origin. Our statute of 1853 (sections 823 and 983, Rev. St. [U. S. Comp. St. 1901, pp. 632 706]) provides what shall, as costs, "be included in and form a portion of a judgment or decree against the losing party." And in Trustees

v. Greenough, 105 U. S. 527, 26 L. Ed. 1157, it was said that costs as between party and party are confined to the matters allowed by the fee-bill act. The challenged items are not within the statute; but appellees claim that the Circuit Court as a court of equity had power to include them in the judgment as costs. Though at law the losing party is adjudged to pay to his adversary the latter's taxable costs laid out and expended in the litigation, in equity the chancellor has a broad discretion respecting the allowance and apportionment of such costs between the parties. Courts of equity also have a wide discretion in making and controlling allowances from the fund for services and expenses in conserving and administering a fund that has been brought into court. And when the appointment of a receiver is determined to be void, or when the fund proves insufficient, it has been held that a court in the exercise of its equity powers may compel the party who procured the receiver to be appointed to pay into court a sum sufficient to meet the expenses of the receivership. Gluck & Becker on Receivers (2d Ed.) pp. 540, 541; Smith on Receivers, pp. 587, 588; Beach on Receivers, (2d Ed.) §§773, 774.) *but, in our opinion, the discretion of a court of equity does not authorize it to require one party (and the sureties on his cost bond) to pay to the other, under the name of costs, items paid from the fund for services and expenses in administering a fund properly in court, nor any other items not within the fee-bill act.* (Italics ours.)

In *Kell* v. *Trenchard*, 146 Fed. 245, decided by the Circuit Court of Appeals for the 4th Circuit. Judge Waddill, speaking for the Court at pages 246 and 247 said:

> "The appellees insist that the action of the lower court complained of is not subject to review by this court, as it relates purely to a matter of costs, which is a matter within the discretion of that court, and not subject to review on appeal. In the view taken by this court, that question is not a very material or practical one, since the appeal in this case relates to the construction to be given to a judgment and decree of this court; and for that reason the same should be subject to the review and action of this court, and it can manifestly best determine what was meant and intended by its own decree. A general discussion and citation of authorities on the subject of the right of appeal in cases affecting costs will be found in Re Michigan Central R. R. Co., 124 Fed. 727, 733, 59 C. C. A. 643 a decision of the Circuit Court of Appeals for the Sixth Circuit. In the federal practice in equity the giving or withholding costs or the apportionment and division thereof is a matter within the discretion of the court; such discretion, however, to be exercised, not arbitrarily, but with reference to the general principles of equity and special circumstances of each case. 2 Bates. Fed. Eq. Proc. §§842, 844; Primrose *v.* Fenno (C. C.), 113 Fed. 375; Electric Co. *v.* Scott (C. C.), 101 Fed. 524, 11 Cyc. 36."

In a recent case brought in the New York State Supreme Court to test the constitutionality of a

similar statute, the court refused to award any costs against the defendant public officials.

> Municipal Gas Co. *v.* Public Service Commission, et al., 113 Misc. Rep. (N. Y.) 748.

POINT IX.

We contend, therefore, that there is no authority for taxing the cost of premiums on Surety Bonds, such as in the instant case as a disbursement; there is no rule or established usage, justifying or permitting such an item to be taxed and furthermore, in all equity and justice it should not be allowed as the substitution was for the convenience and sole benefit of the appellee.

The closing paragraph of the opinion of this court in (Willcox *v.* Consolidated Gas Co., *supra*) is as follows:

> "It may possibly be, however, that a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and in that event complainant ought to have the opportunity of again presenting its case to the Court. To that end we reverse the decree, with directions to dismiss the bill without prejudice, and it is so ordered."

In the opinion in the present case the District Court said as follows (267 Fed. 233):

> "This bill was filed under the leave given in Willcox *v.* Consolidated Gas Co., 212 U. S. 19, to begin a new suit of the same kind after a period of probation should have tested the adequacy of the rate established by the statute." • • •

The master also recognized that this was a continuation of the old suit. Complainant in its direct case offered the testimony of the following deceased witnesses and which was read into the record in spite of the objections of the defendants:

> Colin C. Simpson, pages 6898 to 7025;
> Frederick J. Mayer, 7026 to 7353
> Edmund C. Preiss, 8069 to 8136;

and also in rebuttal certain testimony was offered of Colin C. Simpson at pages 14908 to 15113, and Frederick J. Mayer, pages 15113 to 15292; thus about 726 pages of testimony of the old suit were in the record in this case. (Pages referred to are in the record in Case No. 257, October Term, 1921.)

After this Court had reversed the Circuit Court in the original suit, (Willcox *v.* Consolidated Gas Co., *supra*), the company was required to return the excess collected over 80 cents which was the rate fixed by Chapter 125 of Laws of 1906.

The checks which were made out in payment of refunds to consumers are significant, and were endorsed on the back as follows:

> "This repayment is made in compliance with the directions of the United States Circuit Court and without prejudice to a further

test of the Eighty Cent Gas Act pursuant to the opinion and decree of the United States Supreme Court."

One of the questions that arose was that of the disposition of interest that had accrued on the impounded funds during the period of the litigation.

The headnote of the opinion, Central Trust Co. *v.* New Amsterdam Gas Co., 167 Fed. 983, is as follows:

> "An injunction *pendente lite* was granted at suit of gas companies restraining the enforcement of a reduced rate of charge for gas, but requiring the companies to deposit the excess collected above such rate with the master to await the final determination of the case. In the meantime the master realized some interest on the fund. Some 2½ years later the injunction was dissolved, and it became necessary to refund the amount so impounded to customers to the number of 873,000. Held, that the interest accumulation would be used in the first instance in paying the expense of administering the fund, especially as the cost of making distribution of the same among several million items would absorb a large part of it, and that no disposition of the excess remaining, if any, would be made until the amount of such excess was ascertained."

By this decree, the consumers were deprived of the interest earned by the impounded funds, and the gas company was relieved of the expense of distributing the money.

According to the report filed with the Circuit Court, dated November 8, 1909, the Special Master spent the sum of $380,520.56 and later $15,-124.13, or a total of $395,644.69, in distributing the impounded fund.

These expenses were taken from the fund in accordance with the directions of the Court; the consumers' money being used to pay an expense which should have been borne by the Gas Company, and even after paying out this enormous sum for expense of distribution, the Company still has in its possession almost $500,000.00.

It therefore appears that the precedent was established that in a case such as the instant one, the impounded fund should bear the costs incident to it.

CONCLUSION.

We respectfully submit that the decree of the District Court should be reversed, and the judgment reduced from $129,693.97 to $53,607.97, with costs to appellants.

Dated, New York, February 4th, 1924.

Respectfully submitted,
GEORGE P. NICHOLSON,
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Solicitor for Appellant, Edward Swann,
Municipal Building, New York.

CARL SHERMAN,
Attorney General.

WILBER W. CHAMBERS,
Solicitor for Appellant, Charles D. Newton,
Albany, New York.

JAMES A. DONNELLY,
HARRY HERTZOFF,
WILBER W. CHAMBERS

Supreme Court of the United States.

CHARLES D. NEWTON, as Attorney-General of the State of New York, and EDWARD SWANN, as District Attorney of New York County, *et al.*,
Appellants,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Appellee.

Affidavit of Appellee.

STATE OF NEW YORK,
City and County of New York.

JOHN A. GARVER, being duly sworn, says:

1. I am a member of the firm of Shearman & Sterling, the solicitors for the appellee, and am of counsel in the above entitled cause.

2. A copy of the record on the present appeal has not yet been received by me or my firm, and I am informed and believe that it has not yet been printed. I have no objection to the entry of an order advancing this appeal, provided the record is received at least one month prior to the advanced date.

JOHN A. GARVER

Sworn to before me,
December 28, 1923.
FREDERIC N. GILBERT
Notary Public,
Westchester Co.
Certificate filed in New York County.

FILED
FEB 16 1924
WM. R. STANSBURY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1923.

No. 665.

CHARLES D. NEWTON, AS ATTORNEY-GENERAL OF THE STATE OF NEW YORK, EDWARD SWANN, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, *et al.*,

Appellants,

against

CONSOLIDATED GAS COMPANY OF NEW YORK,

Appellee.

BRIEF FOR APPELLEE,

on appeal from order assessing costs.

SHEARMAN & STERLING,
Solicitors for Appellee,
55 Wall Street,
New York.

JOHN A. GARVER,
Of Counsel.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 565.

CHARLES D. NEWTON, as Attorney General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York, *et al.*,

Appellants,

AGAINST

CONSOLIDATED GAS COMPANY OF NEW YORK,

Appellee.

Brief for Appellee, on appeal from order assessing costs.

Statement.

Appeal by only two of the three defendants (the Attorney General and the District Attorney of New York County, *the Public Service Commission, the other defendant, not appealing*) from an order of Judge Learned Hand made on April 30, 1923 (pp. 20-1), retaxing certain costs upon a rehearing held at his request.

While the appeal is from the entire order of Judge Hand (p. 22), only one of the six items passed upon by him is objected to in the assignment

of errors (p. 21), namely, an item of $76,086, representing premiums paid by the plaintiff on surety bonds required by the Court to be given by the plaintiff, *pending the appeal by the defendants* to this Court from the final decree in favor of the plaintiff. All the other five items of costs were decided by Judge Hand in favor of the defendants.

The bonds required to be given during the pendency of the appeal represented the difference between a maximum rate of $1.20 per thousand cubic feet permitted by the Court and the statutory rate of 80¢ which the Court had held to be confiscatory.

POINTS.

FIRST.

The appeal is not from a final decree.

I. The order appealed from is dignified by calling it a "decree" (p. 22). Reference is also made to a "judgment" entered on this "decree", on July 27, 1923; but this so-called "judgment" is nothing but the record of the final taxation of costs by the Clerk (pp. 36-9). The appeal, however, does not include this so-called "judgment", but is confined solely to the order of Judge Hand retaxing the costs ("Fifth", at bottom of p. 22).

II. The previous appeal by the defendants herein, which involved the question of the compensation of the Special Master, was from a formal decree of the Court (259 U. S., 105).

SECOND.

No appeal will lie where the only question is one of costs.

Even if the item of costs objected to had been included in a final decree or supplemental decree, an appeal does not lie to this Court where the appeal is confined solely to the question of costs.

> Canter *v.* Insurance Companies, 3 Pet., 307, 319;
>
> Paper Box Cases, 105 U. S., 766, 772;
>
> City Bank of Fort Worth *v.* Hunter, 152 U. S., 512, 516;
>
> Citizens Bank *v.* Cannon, 164 U. S., 319, 323;
>
> Wigert *v.* First National Bank, 223 U. S., 670, 672.

In Trustees *v.* Greenough (105 U. S., 527), the appeal was from a decree of the court awarding an allowance out of a trust fund *in possession of the Court,* to one who had succeeded in securing the fund. The distinction between that case and cases where the sole question is one of costs alone was pointed out in Citizens Bank *v.* Cannon (*supra*), where the Court said (p. 323):

> "As a general rule, an appeal will not lie in a matter of costs alone."

Moreover, in Trustees *v.* Greenough, the Court, before passing upon the main question, carefully considered (p. 528) whether the orders which had been directed by the Court amounted to a final decree.

This great tribunal was certainly never intended to be made an agency for the correction of clerical errors.

THIRD.

The previous appeals.

This Court has been treated to a full measure of appeals in the course of the present litigation. The appellants, especially the City of New York, whose Corporation Counsel has appeared as solicitor for the District Attorney, have been insistent upon having every contention unsuccessfully advanced by them reviewed by this Court.

The previous appeals to this Court have been as follows:

I. An appeal by the City of New York from an order denying its application to intervene.

City of New York *v.* Consolidated Gas Co., 253 U. S., 219 (June 1, 1920).

II. The main appeal from the final decree declaring the eighty-cent statute confiscatory.

Newton *v.* Consolidated Gas Co., 258 U. S., 165 (March 6, 1922).

III. An appeal by the defendants from the supplemental decree fixing the compensation of the Special Master.

Newton *v.* Consolidated Gas Co., 259 U. S., 105 (May 15, 1922).

FOURTH.

Surety bonds during the pendency of the appeal only.

I. Judge Hand correctly states the fact in his opinion (p. 34), that the surety bonds upon which the premiums in question were paid were those which the plaintiff was required to give *pending the appeal* taken to this Court *by the defendants* from the final decree. They were not the usual surety bonds that plaintiff is required to give as a condition of obtaining a temporary restraining order during the pendency of the suit. In the present litigation, the plaintiff did not apply to the Statutory Court for an injunction *pendente lite,* but continued to supply gas at the statutory rate of eighty certs while the trial was proceeding before the Special Master. The District Court found that the rate complained of was confiscatory, thus rendering the statute void as to the plaintiff and leaving it free to put in force a higher rate, the reasonableness of which could be questioned only by the Public Service Commission.

Morrell *v.* Brooklyn Borough Gas Co. (231 N. Y., 398).

The plaintiff did not, therefore, need any injunctive relief for its protection, as the final decree avoiding the statute would have been a complete defense to any action or proceeding subsequently instituted against the Company by a public official or private consumer.

In re Engelhard, 231 U. S., 646, 651;
City of New York *v.* N. Y. Telephone Co., —U. S.—(March 12, 1923).

Judge Hand, however, granted injunctive relief; and he made it a condition for doing so that, pending the appeal by the defendants to this Court, the Gas Company should not charge more than $1.20, and that it should give surety bonds for the return of the excess over eighty cents, if the defendants should be successful upon their appeal (pp. 30-1).

This Court held that the District Court, sitting as a court of equity, had the power to impose these conditions (258 U. S., 165, 177). Thus, although the statute which limited the right of the Gas Company to charge more than eighty cents had been set aside and although the trial Court recognized that $1.20 might not be an adequate charge, it declined to permit the Gas Company to collect such charge from its consumers and use the proceeds in its business, unless, pending the appeal *by the defendants,* the Company would impound the excess over eighty cents or would give surety bonds for its return, if the decree should be reversed.

Surely, if the District Court possessed this extraordinary power, it might, in the same connection, have provided that if the appellants were not successful on the appeal, they should bear the expense to which the Company might be put in giving the bonds; and that expense was undoubtedly very much more than the mere premiums paid for the surety bonds, as it necessitated the keeping of the books of account of the Company in such manner, pending the appeal, as to show the sum covered by the liability assumed by the surety companies, while the arrangement for giving the bonds had to be made not merely with one company, but with many companies, inasmuch as the decree limited the amount for which any single company could assume liability to $500,000 (p. 32).

II. The order appealed from, allowing the item of $76,086, was made by Judge Learned Hand, under whose direction the final decree requiring the surety bonds to be given, had been entered. He might have provided in that decree for the payment of these premiums by the appellants, if their appeals should not be successful, especially in view of the fact that, in reaching the conclusion that the statute was confiscatory as to the plaintiff, he had resolved every doubt in favor of the defendants, an attitude to which this Court made express reference in its unanimous decision of affirmance (258 U. S., 165, 174). But if he had the power, at that time, to require the defendants to pay for the premiums on the surety bonds, in case they were not successful upon the appeal, he certainly had the same power subsequently, when the question of payment was brought to his attention.

FIFTH.

General usage relied upon by Judge Hand.

I. Judge Hand relied upon the decisions of the courts in the Southern District of New York, which had for many years recognized the right to include in the costs the amount of the premiums paid on surety bonds (p. 34); and he referred to three reported decisions on the subject.

Edison *v.* American Mutoscope Co., 117 Fed., 192 (1902);
The Hurstdale, 171 Fed., 607 (1909);
The Voland, 181 Fed., 643, 667 (1910).

1. In Edison *v.* American Mutoscope Co., the Clerk, in taxing the costs, had disallowed two items representing premiums paid for appeal and supersedeas bonds. Lacombe, *C. J.*, reversed this ruling, on the ground that the disbursements were legitimate and proper and were in accordance with the settled practice of the court.

2. In The Hurstdale, objection was made to the taxation of a payment made to obtain an indemnity bond, on the ground that the amount was paid to individuals, instead of to a surety company. Held, that this made no difference.

3. The Voland was a unanimous decision of the Circuit Court of Appeals (Second Circuit), that premiums paid to a surety company for furnishing a bond for costs in admiralty should be allowed as part of the taxable costs.

II. The appellants, in their brief, seem to be of the opinion that courts of equity have no discretionary power to allow costs, unless the power is

expressly conferred upon them by the general Equity Rules. But nothing is better settled than that a court of equity has very broad discretion in awarding costs (Pomeroy's Equity Jurisprudence (4th ed.), § 1328, note; 15 *Corpus Juris*, 33-4); and, under Equity Rule 68, the Court might even direct the master's fees to be paid by the *successful* party.

III. The general attitude of the public authorities in New York, on the question of the liability for premiums paid on surety bonds, is seen in the provisions of Section 286 of the Surrogate's Court Act (L. 1921, Ch. 438), a reenactment of a statute that has long been in existence:

> "§ 286. *Fiduciaries may include cost of bonds as necessary expense.*
>
> A guardian, trustee, executor or administrator required by law to give a bond as such, may include as a part of his necessary expenses such reasonable sum, not exceeding one per centum per annum, upon the amount of such bond paid his surety thereon, as such court or judge allows."

SIXTH.

The appeal should be dismissed, or the order appealed from should be affirmed.

Washington, February 15, 1924.

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